In the

Supreme Court of the United States

No. 72-428

Dennis T. Tanner III,

Petitioner,

v.

John P. Hayes, Judge, Jefferson Circuit Court,

Respondent.

BRIEF OF NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

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In The

SUPREME COURT OF THE UNITED STATES

No. 73-473

DANIEL T. TAYLOR III,

Petitioner,

v.

JOHN P. HAYES, Judge,
Jefferson Circuit Court,

Respondent.

BRIEF OF THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE*

STATEMENT

The National Lawyers Guild is an association of lawyers, law students and legal workers which seeks to make available the talents and skills of its members to those who are struggling

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* Letters from the respective parties consenting to the submission of this amicus have been filed with the Clerk of this Court.

against oppression and who seek to defend their own civil liberties and the liberties and rights of others under our Constitution. Many of its members are trial lawyers or are otherwise engaged in litigation, both criminal and civil, which has significant social, economic or political overtones and which is concerned with the basic constitutional liberties of their clients and of the people of the United States.

We are, therefore, particularly interested in cases like the instant case. The actions of the Kentucky court constitute a serious attack on the historical right - even duty - of an attorney to represent his client with vigor, skill and devotion; even more important the decisions against petitioner do a profound disservice to his clients and countless others similarly situated who will in the future require the aid of fearless and courageous advocates who may on occasion be required to confront temperamental, biased or even corrupt judges.

The National Lawyers Guild has frequently submitted amicus briefs in similar cases where issues presented to the court are of broad public importance.

POINT I

SUMMARY PUNISHMENT OF THE PETITIONER WITHOUT A TRIAL BY JURY IS, IN THE CIRCUMSTANCES OF THIS CASE, IMPROPER.

This Court has, in a number of cases in the past few years, had occasion to discuss some of the procedural and substantive problems arising out of punishment for contempt of court. These cases considered the propriety of summary punishment, the right of trial by jury, the right to a trial before a judge other than the one originally offended by the alleged contempt and a series of related problems. See, for example, Sacher v. United States, 343 U.S. 1 (1952); Offutt v. United States, 348 U.S. 11 (1954); United States v. Barnett, 376 U.S. 681 (1964); Ungar v. Sarafite, 376 U.S. 575 (1964); Holt v. Virginia, 381 U.S. 131 (1965); Cheff v. Schnacken-

berg, 384 U.S. 373 (1966); Bloom v. Illinois, 391 U.S. 194 (1968); Frank v. United States, 395 U.S. 147 (1969); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Johnson v. Mississippi, 403 U.S. 212 (1971), and see Illinois v. Allen, 397 U.S. 337 (1970). The lower federal courts have also had frequent occasion to consider these and related problems. Typical cases are Schiffer v. United States, 351 F.2d 91 (6th Cir. 1965); United States v. Seale, 461 F.2d 345 (7th Cir. 1972); In re Dellinger, 461 F.2d 389 (7th Cir. 1972); Weiss v. Burr, 384 F.2d 973 (9th Cir. 1973).

The Sacher, Offutt, Holt, Bloom, Mayberry,[1/] Dellinger, Schiffer and Weiss cases involve contempt proceedings against lawyers and, we believe, raise special problems for reasons which will be set forth below.

1/ The petitioner in Mayberry was a layman who was a pro se defendant and therefore was performing the role of a lawyer; the petitioner in Ungar, conversely, was a lawyer whose alleged contempt was committed while a witness.

Aside from the decided cases there has been a great deal of commentary on the subject. The most comprehensive and most recent has been Dorsen and Friedman: Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct, Pantheon Press (1974) (hereinafter referred to as the "Bar Association Report"). That report not only contains extensive commentary on the problem but further contains valuable bibliographical material.

It is not easy to distil from all of this material a set of rules which will provide a reliable guide for future cases, but we suggest that some principles emerge which should be considered by this Court and which would call for reversal in this case.

First and most important we suggest that cases involving lawyers, in which the alleged contempt arises out of courtroom conduct ought to be governed by rules different from that in cases like Cheff v. Schnackenberg, supra, and Frank

v. United States, supra. This is not because the lawyer should enjoy a privileged status. On the contrary, we recognize that lawyers, in this context, have a much greater responsibility to the court and to the public than has a layman. Our constitutional system cannot function without lawyers with the courage to challenge injustice "without fear or favor"; simultaneously, a lawyer should not be permitted to obstruct the judicial process. It follows that every alleged contempt by a lawyer should be treated as a "serious" case, (see Duncan v. Louisiana, 391 U.S. 145, 158 (1970)) for it is serious, and critical to the maintenance of the Constitution.

There are two considerations to be kept in mind in this connection:

(1) The "collateral" consequences to a lawyer of a contempt citation cannot be measured by the length of his prison term nor can it reasonably be compared to the collateral consequences visited upon a layman in the usual case. At stake may be the lawyer's license to continue

to practice law (cf., Sacher v. Bar Association, 347 U.S. 388 (1954); as a member of a profession charged with the most confidential matters, his standing in the community will be seriously affected; his absence from his office, even for one or two months, and his consequent inability to carry out continuing obligations to clients may be fatal to his practice and may have serious consequence for those clients.

(2) Even more important is the effect of such a contempt citation on other members of the bar and especially on those whose practice, like that of petitioner, and like that of many members of the National Lawyers Guild, includes criminal trials raising substantial political, racial or social issues. It is hard to overestimate the effect on the bar of the contempt citation of Harry Sacher. It is no exaggeration to say that for a decade after his convictions, conscientious lawyers who were involved in criminal litigation on behalf of alleged subversives, blacks or other unpopular groups were

profoundly affected by the knowledge that a trial lawyer could be summarily sentenced to six months in jail by the trial judge in a hotly contested criminal case. Similarly, an affirmance of the conviction of petitioner here will be recalled by other lawyers compelled by their duty to their client, to confront an irascible and hostile judge. The ultimate loser will not be the lawyers, but their clients. The consequences of the summary conviction of a lawyer for contempt are thus of much more importance to the people of the United States generally than they are to the members of the bar directly affected.

It is for these reasons that we urge that special consideration should be given to contempt cases involving lawyers and particularly

lawyers involved in litigation.[2/]

In view of the foregoing, we urge:

1. There should never be summary proceedings to hold a lawyer for contempt committed in the course of a trial. The entire concept of summary contempt is of doubtful validity in view of the safeguards of our Constitution. Green v. United States, 356 U.S. 165, 193 (1957) (Black, J. dissenting), and indeed historical research will fail to disclose significant precedent for such proceeding even in the period prior to the adoption of our Constitution in either the United States or England. Green v. United States, supra, 202 et seq. The Sacher case sanctioned such

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2/ We note the difference between this case and a case like Bloom v. Illinois, supra. In the Bloom case the alleged contempt consisted of the filing for probate of a forged will. This Court reversed the conviction on the ground that the petitioner there was entitled to a jury trial and that decision, of course, is quite consistent with other holdings of the court. There is however no danger that the punishment visited upon an attorney who commits such a fraud on the court would have an in terrorem effect on other members of the bar.

summary proceedings against a lawyer in very limited circumstances and we suggest that this Court has never been comfortable with the procedure there approved. Indeed, since the Sacher case, this Court has never repeated its holding, and has found reasons for not applying it.[3/] See, for example, Mayberry v. Pennsylvania, supra. We submit that the rule of Sacher ought to be reconsidered by the court and that the procedure sanctioned therein ought not to be permitted in any circumstances.

There are many reasons for this, and some of them are described in detail in the Bar Association Report, supra at pages 232-238. It is there noted (p. 233) that between 1960 and 1972 there are 39 reported cases in which a trial judge imposed summary punishment on a lawyer for contempt. Twenty-two of those cases were reversed on appeal! Of seven such cases in the federal

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3/ It may well be that the retreat from the Sacher rule started only two years after its promulgation, in Offutt v. United States, supra.

courts, five were reversed. Such a high ratio of reversal to affirmance should be a clear warning that something is seriously wrong, and the trial courts should not be encouraged to continue on a path so destructive of time and energy and so inconsistent with the efficient administration of justice.

We do not, of course, overlook the problem of courtroom disorder. It should be noted, in passing, that the frequency of serious courtroom disorder provoked by a lawyer is much exaggerated and most of the highly publicized cases turn out to be, on analysis, not well founded. 4/

4/ A recent case in point has been the highly publicized conduct of William Kunstler in the recent Anti-Riot Act case in Chicago. He was sentenced by Judge Hoffman to four years and 13 days on 24 specifications. The Court of Appeals dismissed 11 of the specifications and part of another. In re Dellinger, supra at 400. The others were remanded to the District Court for trial before another judge. At that trial, Mr. Kunstler was acquitted on all but two counts, and even on those received no sentence. In re Dellinger, 72 CR 925, N.D. Ill., Dec. 6, 1973.

And for the Sacher contempt, another highly publicized case, see the dissenting opinion of Mr. Justice Franfurter at 343 U.S. 23.

Such courtroom disorder as may occur can be handled in other ways. Lawyers who provoke disorder may be subjected to criminal contempt charges to be tried later by a jury; they may be punished criminally for obstruction of justice; they may be subjected to disbarment proceedings; they may be subjected to civil contempt and fined therefor. It may be that in some few cases such sanctions are not enough to keep order but when that is the case, it may be that such instances are not "sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value." Green v. United States, 356 U.S. at 216 (Black, J. dissenting).

2. There should never be punishment of a lawyer for courtroom contempt without a jury trial.

The history of jury trials in contempt cases calls for some comment. It has, for some years, been the rule that the right to a jury trial in any criminal case depends on the "serious-

ness" of the offense and that to determine seriousness an important, and perhaps decisive element, is the sentence which the legislature has authorized for the offense. If the maximum authorized sentence is over six months, a jury trial is required. Duncan v. Louisiana, 391 U.S. 145.

This rule is not immediately applicable to a contempt case since there is usually no maximum penalty provided by the legislature. One would have thought, as an original proposition, that if a jury trial is required whenever the judge is permitted to impose a sentence of over six months, a fortiori a jury trial would be required where there is no limit at all to the length of sentence the judge may impose, but this Court held otherwise in Cheff v. Schnackenberg, supra; Frank v. United States, supra.

The result is an analomous one. The question of jury trial vel non comes at the beginning of a proceeding; sentence comes at the end. Yet a court confronted with a contempt situation must decide whether to grant a jury

trial on the basis of what it assumes the sentence will be. In Frank v. United States, supra, the Court sought to resolve this logical paradox by imposing a limit on the power of the sentencing court, i.e., by holding that where a jury trial has not been held, the court may not impose a sentence of more than six months. This seems to turn the matter on its head. Usually a judge determines sentence on the basis of the evidence adduced at the trial; here a judge must, before trial, decide whether his sentence will be more or less than six months in order to decide whether to grant a jury trial.

We believe that the argument in favor of a jury trial in all contempt cases is a compelling one, but the argument for requiring a jury trial in cases involving a lawyer is irrefutable. We discuss the "embroilment" problem below, but note here only that the likelihood of extreme hostility on the part of the judge (and hence the need for the protection granted by a jury) is much greater when the alleged contemnor is a

lawyer than when he is a layman. An insult from a layman can be regarded as showing disrespect and discourtesy; an insult from a lawyer cannot help but be regarded as an attack on the judiciary as an institution. Even when another judge is assigned to hear the case he is likely to be vicariously offended by the contemptuous conduct of a lawyer even though he may not be the butt of that contempt.

3. A trial of a lawyer for contempt should always be assigned to a judge other than the one in whose court the contempt allegedly occurred.

If a trial by jury is directed as hereinabove suggested, it necessarily follows that a new judge must be assigned to the case; it would be impossible to call upon a jury to make findings of fact in a situation in which the presiding judge was himself personally familiar with the facts. But even if this Court decides that some cases may be tried without a jury, in accordance with the rule of Frank v. United

States, supra, we submit that in any event the trial should never be before the same judge.

The "embroilment problem" has troubled the courts in all of these cases. In most of the cases, the court has attempted to adopt an objective test of embroilment. What the court has considered in each case was not whether the judge was in fact actually insulted to the point where he was incapable of rendering judgment impartially, but whether the nature of the contempt was such that a normal judge would have been so affected. Thus, in Ungar v. Sarafite, supra, this Court looked at the words in the record and came to the conclusion, without any information as to the character of Judge Sarafite, that a hypothetical judge subjected to this kind of treatment would not have been so affected that he could not try the case fairly. In Mayberry v. Pennsylvania, supra, on the other hand, this Court looked at the language in the record and came to the conclusion that the same hypothetical judge would be so insulted that he could not try

a case without bias. No one conducted an investigation into the personality of the judge in that case.

But as has so frequently been pointed out, judges are human and like other humans, they vary greatly in their reactions to offensive language. Some judges are irascible, hot-tempered and sensitive and are easily angered; other judges are calm, phlegmatic and insensitive; they may be totally unaffected by precisely the same conduct on the part of an alleged contemnor. It is clearly improper for this Court to make assumptions concerning the embroilment or non-embroilment of a judge in a criminal case without any evidence as to his actual feelings. And it is equally true that an appellate court could hardly take evidence on the boiling point of a trial judge.

The way out of the dilemma is clear. The offended judge ought not to sit at the trial because there is a grave danger that he will be unable to maintain the disinterestedness required

of a judge and because even if he is one of those rare individuals who can keep his balance under these circumstances, the appearance of bias cannot be avoided.

Moreover, in every contempt case, the judge is the actual complainant, and it is inconsistent with our system of justice that a complainant should sit on his own case.

In addition, of course, there is no reason at all in public policy why the judge in whose court the contempt occurred should preside over the contempt trial once we agree that a summary proceeding is improper.

POINT II

THE RIGHT OF ALLOCUTION WAS IMPROPERLY DENIED TO THE PETITIONER.

The right of allocution is a well established and ancient right in any criminal case and there is no possible justification for denying it to any defendant. Judges are all assumed to be reasonable men and reasonable men may sometime be convinced by argument. It may effect not only their finding of guilt or inno-

cence, but more frequently the sentence they impose.

It is clear that the right of allocution was denied to the petitioner in the present case. The recent law on the subject is fully discussed in Weiss v. Burr, supra, and need not be repeated here.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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